Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
	)	GN Docket No. 13-86
Substantive Indecency Policy	)	
	)	

COMMENTS OF PROFESSOR CHRISTOPHER M. FAIRMAN

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June 15, 2013

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EXECUTIVE SUMMARY

The Commission should completely abandon its regulation of broadcast indecency. Both the Commission and the Supreme Court based indecency regulation on the unique, pervasive presence of broadcast media and the need to protect children from unsupervised access to it. This legal foundation no longer exists. Thirty-five years of rapid technological change have reduced broadcast television from the once dominant media source to only one voice in the chorus. Technological innovation has also armed parents with the V-chip and similar tools to control unwanted access to media. With its foundation eroded, indecency regulation should similarly vanish.

There are additional reasons the Commission should stop its current indecency policy. First, there is no evidence of any harm from the broadcast of indecent language. Instead, the Commission relies on lay opinion and citizen complaints that distort determination of contemporary community standards. If the Commission continues its current course, it will not only chill constitutionally protected speech, but also do so in a discriminatory way.

The best course of action for the Commission is to abandon the use of its current indecency policy in its entirety. However, if the Commission is unwilling to embrace this approach, at a minimum, it should turn the regulatory clock back and restore the indecency policy in place prior to the Commissioners' intervention in *Golden Globe II*. The agency should abandon its *per se* rule and return to recognizing the linguistic distinction between sexual and nonsexual uses of "fuck" and similar language. Fleeting expletives should no longer be actionable. Additionally, profanity as an independent violation should be abandoned.

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To: The Commission

COMMENTS OF PROFESSOR CHRISTOPHER M. FAIRMAN

I am the Alumni Society Designated Professor of Law at the Michael E. Moritz College of Law at The Ohio State University. For the past ten years, one area of my scholarly interest has been the intersection of the law and taboo language. The broadcast indecency policy of the Federal Communications Commission (FCC or Commission) is one of the key areas of my research. I have previously published my thoughts on the regulation of indecent language in a law review article, *Fuck*, 28 CARDOZO L. REV. 1711 (2007), and in a recent book, FUCK: WORD TABOO AND PROTECTING OUR FIRST AMENDMENT LIBERTIES (Sourcebooks 2009). In addition, I have a forthcoming article entitled *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICHIGAN ST. L. REV. ___ (forthcoming 2013).[1] Because of my scholarship in this area, I have been described by the NEW YORK TIMES as the "nation's

[1] An early version of this article is available as Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, Ohio State Public Law Working Paper No. 193 (Feb. 25, 2013), available at http://ssrn.com/abstract=2223992.

leading authority on the legal status of the word ["fuck."].[2] The views expressed in these publications, as well as this public commentary, are my own and should not be attributed to the institutions with which I have affiliation.

I. Historical and Procedural Background.

A. Historical Background of the FCC's Broadcast Indecency Policy.

1. *Pacifica* and the policy of restraint.

Title 18 U.S.C. § 1464 provides the statutory authority for the Commission's regulation of indecent language. It states that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." The FCC is the agency empowered to administratively enforce § 1464.[3] Significantly, although the Commission had the authority to regulate indecent broadcasts under § 1464 since 1948,[4] it did not begin to

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[2] Adam Liptak, *A Word Heard Often, Except at the Supreme Court*, NY TIMES, Apr. 30, 2012, http://www.nytimes.com/2012/05/01/us/a-word-heard-everywhere-except-the-supreme-court.html (describing Fairman as "nation's leading authority on the legal status of the word [fuck]"). Slightly less glamorously, I have also been called "Professor Fuck." *See* Margaret Lyons, *5 Minutes with Christopher M. Fairman*, Time Out Chicago, July 13, 2006, *available at* http://timeoutchicago.com/things-to-do/43279/5-minutes-with-christopher-m-fairman.

[3] Prior to the creation of the FCC, its predecessor, the Federal Radio Commission, was authorized to prosecute obscene, indecent, or profane language uttered by means of radio communication. *See* FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2312 (2012) [hereinafter *Fox II*]. Congress authorized the enforcement between the hours of 6 a.m. and 10 p.m. *See id*. Despite the statutory limitation to radio communication, the Commission applies its regulations to radio and television broadcasters alike. *See* FCC v. Fox Televisions, Inc., 556 U.S. 502, 505-06 (2009) [hereinafter *Fox I*].

[4] *Fox II*, 132 S. Ct. at 2312. Presumably, the FCC had the power to regulate such speech since its inception in 1934 because the legislation creating it adopted the 1927 Radio Act's prohibition against the broadcast of obscene, indecent, and profane language. However, in 1948, the ban on obscene, indecent, and profane language was amended and replaced with criminal penalties for using such language over the airwaves, struck from the Communications Act, and incorporated into the Criminal Code. *See* Keith

exercise it until the 1970's.[5]

The Commission's current policy regulating broadcast indecency has its genesis in *FCC v. Pacifica Foundation*.[6] Following New York City radio station WBAI's broadcast of George Carlin's "Filthy Words"[7] routine at 2:00 p.m. on Tuesday, October 30, 1973, a lone citizen complained.[8] This complaint provided a test case for the FCC's

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Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1479 (2005). This recodification made the Department of Justice responsible for criminal enforcement of § 1464. While this reclassification created some uncertainty as to the FCC's continuing ability to administratively enforce § 1464, the Court concluded the FCC retained power to impose sanctions under § 1464 in *Pacifica*. 438 U.S. at 738.

[5] *Fox II*, 132 S. Ct. at 2312; *see* Angela Campbell, *Pacifica Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 198 (2010). Prior to 1970, the FCC did occasionally react to isolated concerns about indecency, but did not rely on § 1464. *See* Brown & Candeub, *supra* note 4, at 1481-83 (discussing isolated examples).

[6] 438 U.S. 726 (1978).

[7] The Commission described Carlin's monologue as follows:

> [I]t consisted of a comedy routine, frequently interrupted by laughter from the audience, and that it was almost wholly devoted to the use of such words as 'shit' and 'fuck,' as well as 'cocksucker,' 'motherfucker,' 'piss,' and 'cunt.' The comedian begins by stating that he has been thinking about 'the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . .' Thereafter there is repeated use of the words 'shit' and 'fuck' in a manner designed to draw laughter from his audience.

In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 95, ¶ 5 (1975) [hereinafter *WBAI*].

[8] *Pacifica*, 438 U.S. at 729-30. The veracity of this allegation is questionable. The complaint was from John H. Douglas, a member of the national planning board of Morality in Media. He was quite the opposite of a typical listener to WBAI, described as culturally and politically on the left. If Douglas was actually listening to the station, it was in a deliberate attempt to be offended. The fact that he waited six weeks after the broadcast to complain suggests that he had not been listening, but instead learned of the broadcast some time later. This conclusion is bolstered by the lack of candor about the fact that his "young son" was fifteen years old at the time—and who, living in New York City, had likely heard the words in Carlin's broadcast before. *See* L.A. Powe, Jr., Red Lion *and* Pacifica: *Are They Relics?*, 36 PEPP. L. REV. 445, 461 (2009).

new interpretation of indecency.[9] Prior to *Pacifica*, the Commission had relied substantially on the definition of obscenity.[10] The Supreme Court had, however, recently refined its obscenity definition to include an appeal-to-the-prurient-interest standard.[11] Wanting to divorce indecency from obscenity, the Commission announced that "the concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[12] From its inception, special regulation of broadcast indecency was premised on the ubiquitous and intrusive presence of radios in the home and their accessibility by unsupervised children.[13]

Ultimately, the Supreme Court upheld the Commission's authority to regulate broadcast indecency as constitutional under the First Amendment in its 5-4 decision.in *Pacifica*.[14] Understanding the contours of permissible indecency regulation requires careful dissection of the Justices' opinions because the majority parts ways on the First

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[9] *See* Campbell*, supra* note 5, at 205-06.
[10] *WBAI*, *supra* note 7, at 97, ¶ 10.
[11] *See* Miller v. California, 413 U.S. 15, 24 (1972).
[12] *WBAI*, *supra* note 7, at 98, ¶ 11.
[13] In its *Pacifica* order, the Commission identified four important considerations supporting special treatment for broadcasting indecency: "(1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference . . . ; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest." *WBAI*, *supra* note 7, at 97, ¶ 9. Of these four, "special concern to the Commission as well as parents is the first point regarding the use of radio by children." *Id*.
[14] The majority was Stevens, Burger (Chief Justice), Rehnquist, Powell, and Blackmun. The dissenters were Justices Stewart, White, Brennan, and Marshall. *See Pacifica*, 438 U.S. at 728-29.

Amendment analysis. Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, based his analysis on the relative value of the content of the speech. Stevens wrote that "patently offensive references to excretory and sexual organs and activities . . . surely lie at the periphery of First Amendment concern."[15] On the central question of whether the First Amendment permitted any restriction on indecent speech, Stevens characterized Carlin's monologue as "no essential part of any exposition of ideas" and "of such slight social value," with any benefit being "clearly outweighed by the social interest in order and morality."[16]

Stevens then embraced the FCC's position that broadcasting indecency required special treatment. First, broadcast media was different because of its "uniquely pervasive presence."[17] Patently offensive, indecent material broadcast "over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[18] Additionally, broadcasting is uniquely accessible to children. Stevens claimed that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[19] Consequently, the FCC's special treatment for indecent broadcasting was reasonable under the circumstances. Nonetheless, Stevens emphasized the narrowness of the holding. Of particular importance, Stevens made clear that the Court had "not decided that an occasional expletive in either setting would justify any sanction."[20]

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[15] *Id*. at 742.
[16] *Id*. (quoting Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
[17] *Id*. at 748.
[18] *Id*.
[19] *Id*. at 749.
[20] *Id*. at 750.

Justice Powell, joined by Blackmun, concurred with the protection of children rationale.[21] Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children.[22] Similarly, Powell agreed about the uniqueness of broadcast media and its ability to invade the privacy of the home, "the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds."[23] He also reiterated the limited nature of the case: "The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."[24]

Properly understood, the holding in *Pacifica* is quite narrow. The majority of the Court holds that the FCC could regulate broadcast indecency because of the pervasive presence of broadcast media and its potential impact on unsupervised children. However, all five Justices in the majority underscore that this holding does not apply to the occasional, isolated "fleeting" expletive.[25]

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[21] *Id*. at 755 (Powell, J., concurring in part and concurring in judgment).
[22] *Id*. at 757 & n.1.
[23] *Id*. at 759.
[24] *Id*. at 760-61. Powell wrote separately, however, to distance himself from the theory that the Court was free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection and which is less "valuable" and hence deserving of less protection. *Id*. at 761-62.
[25] Of course, the four dissenters would not allow the FCC to regulate indecency at all. All four agreed with Justice Stewart that the term "indecent" as used in §1464 should have the same meaning as "obscene" speech. *Pacifica*, 438 U.S. at 780 (Stewart, J., dissenting). Since Carlin's language was not obscene, the FCC lacked the authority to restrict it. *Id*.

Given the limited scope of authority approved by the Court in *Pacifica*, the FCC wisely followed a policy of restraint in enforcement for over a decade.[26] First, it limited its focus to the broadcast of the seven taboo words at issue in *Pacifica*.[27] Additionally, it created a safe harbor for indecent broadcasts between the hours of 10:00 p.m. and 6:00 a.m.[28] Moreover, the FCC continued to reassure broadcasters that the use of fleeting expletives would not be the subject of enforcement actions.[29] As a result, the FCC took no action against a broadcaster for indecency after *Pacifica* in 1975 until 1987.[30]

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[26] *See* Robert Corn-Revere, *FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, 2009 CATO SUP. CT. REV. 295, 305 (2009) ("After the Supreme Court upheld its authority to enforce Section 1464, the Commission continued—as it had promised—to show great restraint in its construction of the law.").

[27] *See* Fox Televisions, Inc. v. FCC, 489 F.3d 444, 449 (2d Cir. 2007), *rev'd*, 556 U.S. 502 (2009); Terri R. Day & Danielle Weatherby, *Bleeeeep! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 483 (2012) (describing the limitation to only those seven words).

[28] Action for Children's Television v. FCC, 852 F.2d 1332, 1336 (D.C. Cir. 1988) [hereinafter *ACT I*].

[29] *See, e.g.*, In re Application of Pacifica Found. For Renewal of License for Noncommercial Station WPFW(FM), 95 F.C.C.2d 750, 760, ¶¶ 16, 18 (1983) (holding three separate occasions using "motherfucker," "fuck," and "shit," did not amount to "verbal shock treatment").

[30] *See* KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 180 (5th ed. 2007) (claiming the FCC found no actionable cases for indecent programming between 1975 and 1987,). Robert D. Richards & David J. Weinert, *Punting in the First Amendment's Red Zone: The Supreme Court's "Indecision" on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers*, 76 ALB. L. REV. 631, 642 (2012-13) (describing FCC restraint).

An example of this policy of restraint is seen in the license renewal of Boston's public television station, WGBH. *See* WGBH Educational Found., 69 F.C.C.2d 1250 (1978) (issued July 31, 1978). Morality in Media had petitioned the FCC to deny renewal of WGBH for broadcasting a number of programs including an "unidentified installment of the *Masterpiece Theatre* series," which contained all seven of Carlin's filthy words; several episodes of *Monty Python's Flying Circus,* which included "vulgarity, nudity, and sacrilege"; and a program entitled *Rock Follies,* which contained "obscenities" such as "shit" and "bullshit."[30] *See id*. at 1250, ¶ 2; Campbell, *supra* note 5, at 244 (quoting former FCC Chief of Staff Frank Lloyd that the unidentified program was "Molly Bloom's soliloquy in Ulysses which had all the seven dirty words in it"). In

2. Infinity Order and Policy Statement.

In 1987, the FCC began its shift away from a policy of restraint by issuing the Infinity Order—a ruling affirming on reconsideration three separate broadcasts as indecent.[31] The FCC explained in the Infinity Order that it would no longer take the narrow view that a finding of indecency required the use of one of the seven "dirty words" used in Carlin's monologue.[32] The FCC said it made no legal or policy sense to regulate the Carlin monologue but not "material that portrayed sexual or excretory activities or organs in as patently offensive a manner" simply because it avoided certain words.[33] The FCC instead would use the generic definition of indecency it had articulated in its prior decision in *Pacifica.*

Under the Commission's definition, "indecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[34] They reaffirmed, however, that a fleeting expletive would not be actionable.[35] The FCC also preserved a distinction between literal and nonliteral uses of evocative language; deliberate and

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rejecting the challenge, the FCC stated that *Pacifica* "affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station."[30] WGBH Educational Found., 69 F.C.C.2d at 1254, ¶ 10. Instead, the FCC intended to strictly observe the narrowness of the *Pacifica* holding. *Id*. Therefore, the FCC concluded there was no showing of abuse by WGBH of its programming discretion. *Id*.

[31] In re Infinity Broadcasting Corp. of Pennsylvania, Licensee of Station WYSP(FM); In re Pacifica Found., Inc., Licensee of Station KPFK–FM; In re The Regents of the University of California, Licensee of Station KCSB–FM, 3 F.C.C.R. 930 (1987) [hereinafter *Infinity Order*]; *see Fox I*, 489 F.3d at 450. In an appendix to the Infinity Order, the FCC specifically identified the indecent speech from each action. *See Infinity Order*, 3 F.C.C.R. at 934-35.

[32] *See Infinity Order, supra* note 31, at 930, ¶ 5.

[33] *Id*.

[34] *Id*.

[35] *Fox I*, 489 F.3d at 449.

repetitive use was a requisite to a finding of indecency when a complaint focused solely on the use on nonliteral expletives.[36]

The uncertainty generated after the Infinity Order led the FCC to issue a Policy Statement in 2001 to provide guidance to the broadcast industry on its enforcement of § 1464 and indecency.[37] The Policy Statement restated the two-part test to define indecent broadcasting. First, the material must depict sexual or excretory organs or activities.[38] If so, then the FCC determines if the material is patently offensive as measured by community standards for the broadcast medium.[39] To provide a framework for determining what it considered patently offensive, the FCC explained that three factors proved significant: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have

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[36] Pacifica Found., Inc., 2 F.C.C.R. 2698, at ¶ 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."). The Infinity Order also retreated from the safe harbor period by concluding that indecent speech was actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience, whether before or after 10:00 p.m. *See Infinity Order, supra* note 31, at 930-31. Broadcasters appealed the Infinity Order to the D.C. Circuit which rejected the FCC's push-back of the safe harbor until midnight because the agency "failed to adduce evidence or cause" to support the expanded restraint and remanded the matter for the FCC's reconsideration of an appropriate safe harbor period. *ACT I*, 852 F.2d at 1335. After two congressional attempts to mandate the safe harbor period and two additional trips to the D.C. Circuit, the safe harbor was ultimately returned to 10:00 p.m. to 6:00 a.m. *See* Brown & Candeub, *supra* note 4, at 1491-92 (describing the three ACT cases and congressional reactions).

[37] In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Indecency, 16 F.C.C.R. 7999 (2001) [hereinafter *Policy Statement*].

[38] *Id*. at 8002, ¶ 7.

[39] *Id.* at 8002, ¶ 8.

been presented for its shock value."[40] With regard to the second factor, the FCC explained that repetition of and persistent focus on sexual or excretory material had been cited consistently as factors that exacerbated the potential offensiveness of broadcasts.[41] In contrast, where sexual or excretory references had been made once or had been passing or fleeting in nature, this characteristic weighed against a finding of indecency.[42]

3. *Golden Globe II.*

Despite the recently issued Policy Statement, the FCC's approach to indecency changed dramatically following NBC's broadcast of the Golden Globe Awards on January 19, 2003. During the show, U2's lead singer Bono accepted the award for Best Original Song in a Motion Picture[43] with excitement exclaiming: "This is really, really fucking brilliant."[44] The statement was delivered live on the East Coast, but was bleeped later on the West Coast.[45] There were 234 total complaints to the FCC, of which 217 were part of an organized campaign launched by the Parents Television Council (PTC).[46] FCC Enforcement Bureau Chief David Solomon issued a decision of no liability on the part of the broadcasters because the Policy Statement, as a threshold matter, required indecent speech to describe sexual or excretory organs or activities.[47]

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[40] *Id*. at 8003, ¶ 10.
[41] *Id*. at 8008, ¶ 17.
[42] *Id*.
[43] The song was "The Hands That Built America." The film was GANGS OF NEW YORK (Miramax Films 2002).
[44] *See* Susan Crabtree, *Banning the F-Bomb*, DAILY VARIETY, Jan. 14, 2004, at 66 (quoting Bono).
[45] *See* Jim Rutenberg, *Few Viewers Object as Unbleeped Words Spread on Network TV*, N.Y. TIMES, Jan. 25, 2003, at B7.
[46] *See* In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order, 18 F.C.C.R. 19,859, 19,859 & n.1 (2003) [hereinafter *Golden Globe I*].
[47] *See id*. at 19860-61, ¶ 5.

Solomon concluded that Bono used "fucking" as an adjective or expletive, not to describe sex or excretory matters.[48] Moreover, a fleeting and isolated use of "fuck" was considered nonactionable under FCC precedent.[49]

The PTC lobbied the Commissioners to reverse Solomon's decision because in their view any use of the word "fuck" on broadcast television was patently offensive.[50] On March 18, 2004—over a year after the Golden Globe Awards—the Commission granted the PTC's application for review and concluded that Bono's use of "fucking" was not only indecent, but also profane.[51]

To reverse the Enforcement Bureau, the Commissioners made three significant departures from previous policy. First, any finding of indecency required the phrase "really fucking brilliant" to describe sexual activities.[52] To turn Bono's nonsexual expletive into a description of sexual activities, the Commissioners held that any use of the word "fuck" is *per se* sexual: "[W]e believe that, given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[53] To reach this result, the Commissioners abandoned the Infinity Order, the Policy Statement, and its own precedent.[54]

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[48] *Id*. at 19861, ¶ 5.
[49] *Id.* at 19861, ¶ 6.
[50] *See* In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4976, ¶ 3 (2004) [hereinafter *Golden Globe II*].
[51] *See id.* at 4975, ¶ 3.
[52] *Id.* at 4977, ¶ 6.
[53] *Id*. at 4978, ¶ 8.
[54] *See, e.g*., Mr. Peter Branton, 6 F.C.C.R. 610 (1991)(broadcast of repeated use of fuck by John Gotti found not indecent); Entercom Buffalo License, LLC (WGR(AM)), 17

The second significant departure made by the Commissioners was reversing its position on "fleeting expletives." The second prong of indecency analysis required the language to be patently offensive based on three factors described in the Policy Statement; it must be explicit, repeated, and shocking.[55] Since Bono's use of a single, fleeting expletive would prelude a finding of patent offensiveness, the Commissioners again reversed themselves: "While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."[56]

The third departure was the application of a whole new, independent ground for speech restriction—profanity. Section 1464 applies to "obscene, indecent, or profane language."[57] However, the FCC had never used profanity as a basis for speech regulation.[58] The Commissioners recognized that the "limited case law on profane

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F.C.C.R. 11997, 11999-12000 ¶¶ 7, 9-10 (2002) (finding use of "prick" and "piss" not indecent because words were not used to describe sexual or excretory acts or organs).

[55] *See Policy Statement*, *supra* note 37, at 8003, at ¶ 10 (listing 3 factors).

[56] *Golden Globe II*, *supra* note 50, at 4980, ¶ 12. The Commissioners conclusions on the other factors are also suspect. They stated that fucking was "explicit or graphic" because the "'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language." *Id*. at 4979, ¶ 9. In this context, the Commissioners repeat the error made in declaring all uses of fuck *per se* sexual. The final factor was met because "the use of the 'F-Word' here, on a nationally telecast awards ceremony, was shocking and gratuitous" without further explanation. *Id.*

[57] 18 U.S.C. § 1464.

[58] *See* Statement of Chairman Michael K. Powell, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4988, 4988 (2004) (noting this was the first time the profanity section was applied to "fuck" and stating that "today's decision clearly departs from past precedent").

speech had focused on what is profane in the sense of blasphemy."[59] Nonetheless, the Commissioners declared that "fuck" was profane on the strength of common knowledge that profanity meant "vulgar, irreverent, or coarse language,"[60] a stale Seventh Circuit case that predated *Pacifica*,[61] and *Black's Law Dictionary*.[62]

By 2004, the FCC's approach to indecency enforcement bore little resemblance to the policy of restraint exercised post-*Pacifica*. Under *Golden Globe II*, the FCC was now free to go after fleeting expletives, any use of "fuck," and profanity. During this period of aggressiveness, the target of enforcement even included alleged incidents of indecency that happened prior to *Golden Globe II*. This in turn spawned the *Fox* Litigation.

4. *Fox* Litigation and the return of restraint.

With the intention of providing substantial guidance about the types of broadcasts that were impermissible under the new indecency standard, on February 21, 2006, the FCC issued an Omnibus Order resolving various complaints against several television broadcasts.[63] In one part of the Omnibus Order,[64] the FCC found four

[59] *Golden Globe II*, *supra* note 50, at 4981, ¶ 14; *see also* Statement of Commissioner Kathleen Q. Abernathy, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4989, 4989 (2004) ("Rather, 'profane' language has historically been interpreted in a legal sense to be blasphemy.").
[60] *Golden Globe II*, *supra* note 50, at 4981, ¶ 13.
[61] *See* Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972).
[62] *See Golden Globe II*, *supra* note 50, at 4981, ¶ 13 n.34 (citing *Black*'s last definition of profane).
[63] *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*].
[64] In Section III.B. of the Omnibus Order, the FCC identified four programs that were indecent and profane, but the agency did not propose any forfeitures because the incidents predated the order in *Golden Globe II*. *See id.* at ¶¶ 100-145.

programs indecent and profane under the policy announced in *Golden Globe II* because of the language used. The objectionable programs were:

> Fox's 2002 *Billboard Music Awards* where, in her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em";[65]
>
> Fox's 2003 *Billboard Music Awards* where Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple";[66]
>
> ABC's *NYPD Blue* where in various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead";[67] and
>
> CBS's *The Early Show* where during a live interview of Twila Tanner, a contestant from CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."[68]

In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globe II* that any use of the word "fuck" was presumptively indecent and profane.[69] The FCC then concluded that any use of the word "shit" was also presumptively indecent and profane because it is "a vulgar, graphic, and explicit description of excretory material" and "[i]ts use invariably invokes a coarse excretory image, even when its meaning is not the literal one."[70] Turning to the second part of its indecency test, the FCC found that each of the programs were "patently offensive" because the material was explicit, shocking, and gratuitous.[71] It dismissed the fact that the expletives were fleeting and isolated and, relying on *Golden Globe II*, held that

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[65] *See id.* at ¶ 101.
[66] *See id.* at ¶ 112 & n.164.
[67] *See id.* at ¶ 125.
[68] *See id.* at ¶ 137.
[69] *Id.* at ¶¶ 102, 107.
[70] *Id.* at ¶¶ 138, 143.
[71] *See id.* at ¶¶ 106, 120, 131, 141.

repeated use was not necessary for a finding of indecency.[72] The FCC, however, declined to issue a forfeiture in these four cases because the broadcasts occurred before the decision in *Golden Globe II,* and thus "existing precedent would have permitted this broadcast."[73]

The networks sought review of the Omnibus Order in the court of appeals.[74] However, the Second Circuit granted the FCC a voluntary remand to permit the agency to consider the networks' arguments.[75] After soliciting public comments, the FCC issued a new Remand Order replacing the entire section of the Omnibus Order that dealt with the four broadcasts previously found indecent and profane.[76]

The Remand Order reaffirmed its conclusion that the 2002 and 2003 *Billboard Music Award* programs were both indecent and profane.[77] With regard to the 2003 *Billboard Music Awards*, the FCC found that it would have been indecent even prior to the decision in *Golden Globe II* because Nicole Richie used "two extremely graphic and offensive words" that were "deliberately uttered" because of "Ms. Richie's confident

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[72] *See id.* at ¶¶ 104, 116, 129, 140.
[73] *See id.* at ¶¶ 111, 124, 136, 145. It is this fundamental violation of due process—advanced notice that the government could punish one's conduct—that provides the ultimate resolution of the *Fox* Litigation.
[74] Fox and CBS filed a petition for review of the Omnibus Order in the Second Circuit. ABC filed a petition for review in the D.C. Circuit, which was then transferred to the Second Circuit and consolidated with the petition for review filed by Fox and CBS. *See Fox I*, 489 F.3d at 453.
[75] On September 7, 2006, the Second Circuit granted the FCC's request for remand and stayed enforcement of the Omnibus Order. The Commission was given sixty days to issue a final or appealable order, at which time the pending appeal would be automatically reinstated. *See id.*
[76] *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) [*Remand Order*].
[77] *Id*. at ¶¶ 12-66.

and fluid delivery of the lines."[78] With regard to the 2002 *Billboard Music Awards*, the FCC acknowledged that "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast."[79] In both cases, the FCC rejected Fox's argument that fleeting expletives were not actionable, now characterizing its prior decisions on that issue as "staff letters and dicta."[80] The FCC still declined to impose a forfeiture in either case.[81]

However, the FCC reversed its finding against *The Early Show* concluding that, while "there is no outright news exception to our indecency rules," the language was part of a news interview where it was "imperative that we proceed with the utmost restraint."[82] While expressing some doubt about whether the segment was "legitimate news programming" or "merely promotions for CBS's own entertainment programming," the FCC deferred to "CBS's plausible characterization of its own programming."[83] Accordingly, the FCC now denied the complaint because "regardless of whether such language would be actionable in the context of an entertainment program," it was "neither actionably indecent nor profane in this context."[84] The Remand Order also dismissed on procedural grounds the complaint against *NYPD Blue*. It turns out that the sole complainant resided in the Eastern time zone where *NYPD Blue* was broadcast during the recognized safe harbor period after 10:00 p.m.[85]

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[78] *Id.* at ¶ 22.
[79] *Id.* at ¶ 60.
[80] *Id.* at ¶ 20.
[81] *Id.* at ¶¶ 53, 66.
[82] *Id*. at ¶ 71.
[83] *Id*. at ¶ 72.
[84] *Id*. at ¶ 73.
[85] *Id*. at ¶ 75.

Fox, CBS, and NBC (the "Networks") challenged the Remand Order in the Second Circuit,[86] raising administrative and constitutional law arguments.[87] In a 2-1 decision, the Second Circuit found the FCC's new fleeting expletives policy was arbitrary and capricious because it made "a 180-degree turn" without "a reasoned explanation justifying the about-face."[88] Having held the FCC's change in policy on fleeting expletives was arbitrary and capricious, the majority did not decide the constitutional issues.

The Supreme Court reversed the Second Circuit in a 5-4 decision based purely on administrative law principles. Justice Scalia, writing for the majority, explained that while it is well settled that under the Administrative Procedure Act (APA) the courts may set aside agency action that is arbitrary and capricious, this was a "narrow" standard of review.[89] The Second Circuit erred by "requiring a more substantial explanation for agency action that changes prior policy."[90] Judged under the proper standard, the majority found the FCC's new indecency enforcement policy was neither

[86] The Second Circuit appeal of the Omnibus Order was automatically reinstated on November 8, 2006 under the terms of the original order granting the voluntary remand to the FCC. After the Remand Order, only the two Fox broadcasts were at issue. Fox then filed a petition for review of the Remand Order which was consolidated with the original appeal. The Second Circuit then granted the intervention of CBS Broadcasting Inc. ("CBS") and NBC Universal Inc. and NBC Telemundo License Co. (collectively, "NBC"). ABC opted to forgo participation in this appeal. *See Fox I*, 489 F.3d at 453-54.
[87] *Id*. at 454.
[88] *Id*. at 455. The three-judge panel of the Second Circuit was composed of Rosemary Pooler, Pierre Leval, and Peter Hall. Judge Leval dissented because he believed the FCC gave a reasoned explanation for the change complying with the APA. *See id.* at 467-74 (Leval, J., dissenting).
[89] *Fox I*, 556 U.S. at 513.
[90] *Id*. at 514.

arbitrary nor capricious.[91] Having found the FCC's action to be neither arbitrary nor capricious, the Supreme Court remanded the case to the Second Circuit to definitively rule on the constitutionality of the FCC's orders.[92]

On remand, the Second Circuit addressed the constitutional questions that it had reserved from the prior decision. This time the panel was unanimous that the FCC's indecency policy was unconstitutionally vague and therefore invalid in its entirety.[93] The first problem the court of appeals identified was the FCC's inconsistency in determining which words were patently offensive, such as their conclusion that "bullshit" in an *NYPD Blue* episode was patently offensive while "dick" and "dickhead" were not.[94] The

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[91] *Id.* at 517. The Court noted the FCC had "forthrightly acknowledged" that it had "broken new ground" in ruling that fleeting and nonliteral expletives could be deemed indecent. *Id.* The Court concluded that the FCC's reasons for expanding the scope of its enforcement activity were entirely rational. Not only was it "certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words," but the Court agreed that the FCC's decision to "look at the patent offensiveness of even isolated uses of sexual and excretory words fits with the context-based approach" sanctioned in *Pacifica*. *Id.* at 517-18. Given that even isolated utterances can be made in pandering, vulgar, and shocking manners, and can constitute harmful first blows to children, the majority held that the FCC could "decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable." *Id.* at 518.

[92] *Id*. at 529.

[93] Fox Television Stations, Inc. v. F.C.C., 613 F.3d 317, 327 (2d Cir. 2010). The court of appeals began by noting how the media world had changed since *Pacifica* with the rise of cable television, satellite broadcasts, and the Internet. *Id*. at 325-26. The uniquely pervasive presence of broadcast television no longer exists—"broadcast television has become only one voice in a chorus." *Id*. at 326. Moreover, technological change such as V-chip technology has given parents the ability to decide which programs they will permit their children to watch. *Id.* In light of these changes, the Second Circuit saw no reason why strict scrutiny should not now apply. Nonetheless, the court was bound by controlling Supreme Court precedent, *Pacifica*. *Id*. at 327.

[94] *Id*. at 330. The court rejected the idea that the FCC's three-factor "patently offensive" test gave broadcasters fair notice. *Id*. Since the FCC's test found "bullshit" was indecent because it was "vulgar, graphic and explicit," while "dickhead" was not indecent because it was "not sufficiently vulgar, explicit, or graphic," broadcasters hardly had notice of how the test would apply in the future. *Id*.

Second Circuit rejected the FCC's argument that it needed a flexible standard because it could not anticipate how broadcasters would attempt to circumvent the prohibition on indecent speech.[95]

The court also found the FCC's presumptive prohibition on the words "fuck" and "shit" impermissibly vague due to the application of two exceptions. According to the court, the FCC could not even articulate much less apply the "bona fide news exception."[96] Thus, the FCC found the use of the word "bullshitter" on CBS's *The Early Show* to be "shocking and gratuitous" because it occurred "during a morning television interview," before reversing itself because the broadcast was a "bona fide news interview."[97] "In other words, the FCC reached diametrically opposite conclusions at different stages of the proceedings for precisely the same reason—that the word bullshitter was uttered during a news program."[98]

Similarly, the court criticized application of the FCC's artistic necessity exception, in which fleeting expletives are permissible if they are "demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance."[99] The court made its point by comparing the disparate

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[95] *Id*. at 331. The court observed: "that people will always find a way to subvert censorship laws may expose a certain futility in the FCC's crusade against indecent speech, but it does not provide a justification for implementing a vague, indiscernible standard. If the FCC cannot anticipate what will be considered indecent under its policy, then it can hardly expect broadcasters to do so." *Id*.
[96] *Id*.
[97] *Id*. at 332.
[98] *Id*.
[99] *Id*. at 331.

treatment of *Saving Private Ryan*[100] and the documentary *The Blues*. The FCC decided that the words "fuck" and "shit" were more integral to the realism and immediacy of the film experience for viewers in *Saving Private Ryan*, "a mainstream movie with a familiar cultural milieu," than such words were in *The Blues*, which "profiled an outsider genre of musical experience."[101] While the FCC argued that a context-based approach was necessary, the court lacked any discernible standards by which individual contexts are judged.[102] According to the Second Circuit, there was ample evidence that the FCC's indecency policy has chilled protected speech.[103]

Following the Second Circuit's decision in *Fox II*, the court had the opportunity to apply its holding to fleeting nudity in *ABC, Inc. v. FCC*.[104] This case involved another episode of ABC's *NYPD Blue*. The episode broadcast on February 25, 2003, showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.[105] On February 19, 2008, the FCC issued a forfeiture

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[100] *See* In re Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan," 20 F.C.C.R. 4507 (2005).
[101] *Fox II*, 613 F.3d at 333.
[102] *Id*.
[103] Examples included: CBS affiliates declining to air the Peabody Award-winning *9/11* documentary; a radio station cancelling a planned reading of Tom Wolfe's novel *I Am Charlotte Simmons,* based on a single complaint it received about the adult language in the book, because the station feared FCC action; and local broadcasters deciding not to invite controversial guests for fear that an unexpected fleeting expletive would result in fines. *Id*. at 334.The court noted that the indecency policy had even chilled programs that contained no expletives, but which contained reference to or discussion of sex, sexual organs, or excretion. *Id*. at 335. Consequently, the absence of reliable guidance in the FCC's standards chilled a vast amount of protected speech dealing with some of the most important and universal themes in art and literature. *Id*.
[104] 404 Fed. Appx. 530 (2d Cir. 2011).
[105] During the scene, in which the character was preparing to take a shower, a child portraying her boyfriend's son entered the bathroom. A moment of awkwardness followed. For a complete description of the scene, see *id*. at 533-34.

order finding the display of the woman's nude buttocks in *NYPD Blue* was actionably indecent.[106] According to the FCC, displays of buttocks fell within the category of displays of sexual or excretory organs because the depiction was "widely associated with sexual arousal and closely associated by most people with excretory activities."[107] The FCC also deemed the scene patently offensive as measured by contemporary community standards and that the nudity was presented in a manner that clearly panders to and titillates the audience.[108] The FCC then imposed a forfeiture of $27,500 on each of the 45 ABC-affiliated stations that aired the indecent episode.[109] Finding no significant difference between this case and *Fox*, and bound by that panel's decision striking down the FCC's indecency policy in its entirety, the Second Circuit vacated the forfeiture order in a summary opinion.[110]

The Supreme Court granted certiorari in both cases and consolidated them for argument.[111] Once again the Court managed to resolve the case while dodging the central question of whether the First Amendment protects broadcasting of indecent language. However, the Court made clear that the FCC was not free to change indecency regulation without notice. In a rare showing of near-unanimity (Justice Sotomayor was recused and Ginsburg concurred in the judgment only), the Supreme Court held that the FCC's fleeting expletives and nudity policy was unconstitutionally vague because it

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[106] *See* In re Complaints Against Various Television Licensees Concerning Their February 24, 2003 Broadcast of the Program "NYPD Blue", 23 F.C.C.R. 3147 (2008).
[107] *Id*. at 3150.
[108] *Id*. at 3153.
[109] 404 Fed. Appx. at 534.
[110] *Id*. at 535.
[111] FCC v. Fox Television Stations, Inc., 131 S. Ct. 3065 (2011).

failed to give proper notice to broadcasters.[112] Justice Kennedy, writing for the Court, noted that the regulatory history "makes it apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation."[113]

While the Court set aside the FCC orders for vagueness as applied to the Fox and ABC broadcasts, it also made clear just how limited its decision was. First, because the Court resolved the cases on a failure to provide fair notice under the Due Process Clause, it was unnecessary to reach the First Amendment implications of the FCC's indecency policy or reconsider *Pacifica*.[114] Second, the Court ruled that Fox and ABC "lacked notice at the time of their broadcasts that the material they were broadcasting could be found actionably indecent under then-existing policies."[115] Accordingly, it was unnecessary for the Court to address the constitutionality of the current indecency policy as expressed in the *Golden Globe II* and subsequent orders.[116] Third, the Court's opinion left the FCC "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements" and "courts free to review the current policy or any modified policy in light of its content and application."[117]

While *Fox II* was working its way through the courts, the FCC essentially stopped pursuing all indecency complaints. By the time the Supreme Court handed

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[112] *Fox II*, 132 S. Ct. at 2317-20.
[113] *Id*. at 2318.
[114] *Fox II*, 132 S. Ct. at 2320. Justice Ginsburg did write a one sentence concurrence in the judgment once again declaring *Pacifica* wrong when issued and in need of reconsideration. *See id.* at 2321 (Ginsburg, J., concurring in judgment).
[115] *Id.* at 2320.
[116] *Id*.
[117] *Id*.

down its decision in June 2012, the FCC had approximately 1.5 million indecency complaints pending, involving about 9,700 broadcasts.[118] In September 2012, the Justice Department dropped a lawsuit complaining of indecent nudity in a 2003 Fox broadcast of *Married by America*.[119] In the wake of this dismissal, Chairman Genachowski reportedly ordered the Enforcement Bureau to "focus its resources on the strongest cases that involve egregious indecency violations" to reduce the backlog of pending complaints.[120] Three months later in December 2012, the Enforcement Bureau had already reduced the backlog to approximately a half million complaints involving about 5,500 broadcasts.[121] As of April 1, 2013, the Enforcement Bureau had now reduced the backlog by 70% dismissing more than one million complaints.[122] These dismissed complaints were described as "complaints that were beyond the statute of limitations or too stale to pursue, that involved cases outside FCC jurisdiction, that contained insufficient information, or that were foreclosed by settled precedent."[123] This massive dump of complaints was apparently in response to Chairman Genachowski's directive to reduce the pending backlog. Notwithstanding this wholesale dismissal, the agency

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[118] *See* Statement of FCC Commissioner Robert M. McDowell on the United States Supreme Court's Decision in FCC v. Fox Television Stations, Inc., 2012 WL 2366332, at *1 (FCC) (June 21, 2012).
[119] *See* Doug Halonen, FCC to Back Away From a Majority of Its Indecency Complaints, The Wrap TV (Sept. 24, 2012 @ 9:20 am), http://www.thewrap.com/tv/column-post/fcc-back-away-majority-its-indecency-complaints-57766.
[120] *Id*.
[121] *See* Statement of Commissioner Robert M. McDowell Federal Communications Commission Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Communications and Technology Oversight of the Federal Communications Commission, 2012 WL 6202231, *8 (F.C.C.) (Dec. 12, 2012).
[122] *See* FCC Reduces Backlog of Broadcast Indecency Complaints by 70% (More than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, Public Notice, DA 13-581, 2013 WL 1324503 (Enf. Bur. and OGC rel. Apr. 1, 2013).
[123] *Id*.

maintained that the "Bureau is also actively investigating egregious indecency cases and will continue to do so."[124] To date, the Commission has not identified an example of an "egregious indecency case" or provided any further guidance.

B. Procedural Background.

On April 1, 2013, the FCC's Enforcement Bureau and Office of General Counsel issued a Public Notice requesting comment on whether the full Commission should make changes to its current broadcast indecency policy.[125] The Public Notice was published in the Federal Register on April 19, 2013, thereby establishing May 20, 2013, as the deadline for filing comments, and June 18, 2013, as the deadline for filing reply comments.[126] On April 26, 2013, the National Association of Broadcasters (NAB) filed a request to extend the deadlines for filing comments and reply comments by 30 days.[127] Recognizing "the importance of affording all interested parties sufficient time to prepare their comments," the Commission granted the request and extended the deadline for filing comments until June 19, 2013 and reply comments until July 18, 2013.[128]

II. The Commission Should Completely Abandon Regulation of Broadcast Indecency.

When Justices at opposite ends of the judicial spectrum, such as Ginsburg and Thomas, both call for the reevaluation of *Pacifica* and its special treatment of broadcast media, its days would seem to be numbered. Yet, despite multiple opportunities to

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[124] *Id*.
[125] *Id*. Perhaps this is in response to the Court's statement in *Fox II* that the FCC is "free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." 132 S. Ct. at 2320.
[126] 78 Fed. Reg. 23,563 (Apr. 19, 2013).
[127] *See* FCC Extends Pleading Cycle for Indecency Policy, DA 13-1071, 2013 WL 1962346 (Enf. Bur. and OGC rel. May 10, 2013).
[128] *Id*.

revisit the case, the Supreme Court has chosen to evade the issue. Eventually, the Court will confront the fact that *Pacifica* is a relic. As a reflection of its time the case may be understandable, but times change. There is little dispute that the media landscape of today is nothing like the 1970s. These changes have permanently eroded the Court's justifications in *Pacifica* for permitting regulation of broadcast indecency. The Commission should candidly recognize that since the justifications for indecency regulation no longer exist, the policy itself should be abandoned.

A. The Legal Foundation for Indecency Regulation No Longer Exists.

From its inception, the Commission premised special regulation of broadcast indecency on the ubiquitous and intrusive presence of radios in the home and their accessibility by unsupervised children.[129] The *Pacifica* Court adopted this view and squarely premised regulation on the unique qualities of the broadcast media. In his plurality opinion, Justice Stevens noted that broadcast media was different because of its "uniquely pervasive presence."[130] Not only was it pervasive, but also intrusive because material broadcast "over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[131] Stevens saw the listener or viewer as someone constantly tuning in and out searching for content because access was limited to chiefly broadcast media in 1978.[132] A majority for regulation was only achieved with the support of Justice Powell. He agreed about the uniqueness of broadcast media and its ability to invade the privacy of the home, "the one place where

[129] *See WBAI*, *supra* note 7, at 97, ¶ 9.
[130] *Pacifica*, 438 U.S. at 748.
[131] *Id*.
[132] *Id*.

people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds."[133] Thus, the Constitution permitted the government's regulation of protected speech to temper the effects of broadcast media's intrusiveness.

1. The pervasiveness of broadcast media can no longer serve as justification for indecency regulation.

Today, it is simply not true that broadcast media has a uniquely pervasive presence in our homes or elsewhere. The Second Circuit captured it best when it observed that "[t]he past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."[134] Today, only a small proportion of households still rely on over-the-air broadcast signals for video programming. In 1978, almost the entire television viewing public relied on such broadcasts compared to 15% at most and perhaps as low as 8% today.[135] Percentages this low are properly characterized as "rare," not as "pervasive."[136]

Traditional over-the-air broadcasts have been displaced. With almost 87% of households subscribing to a cable or satellite service, most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control.[137] Let us not forget the omnipresent Internet "offering access to everything from viral

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[133] *Id*. at 759.
[134] *Fox II*, 613 F.3d at 326; *see* Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287, 288 (2012) (broadcast media no longer dominant force).
[135] Brief of the Cato Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amici Curiae in Support of Respondents, FCC v. Fox Television, Inc., 132 S. Ct. 2307 (2012) (10-1293), 2011 WL 5562515, at *10-11; *see* Gamse, *supra* note 134, at 298 (noting fewer than 10% rely on broadcast).
[136] Brief of the Cato Institute, *supra* note 135, at *11.
[137] *See Fox II*, 613 F.3d at 326; In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 F.C.C.R. 542, at ¶ 8 (2009).

videos to feature films and, yes, even broadcast television programs."[138] Consumers increasingly access new video content through cable, telephone, and satellite operators such as Comcast's Xfinity, EchoStar's DISH Network, AT&T's UVerse, Verizon's FIOS, and DirecTV; over the Internet on popular websites such as YouTube, iTunes, and Hulu; via podcasts; by online video streaming through services such as Netflix; and through DVD purchases and rentals.[139] All of these forms of media come into the home as invited guests, not as intruders.

One of the main factors *Pacifica* cited to justify regulation of broadcast television was that broadcasting was a medium uniquely accessible to children.[140] However, the FCC itself acknowledges that children today "live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago."[141] Indeed, children are leading the shift away from broadcast television to a variety of new media outlets and technologies such as websites, blogs, social networking services, tablet computers, MP3 players, smart phones, other mobile devices, and cable and satellite networks.[142] It is the young that lead in Internet use—

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[138] *Fox II*, 613 F.3d at 326; In re Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video and Audio Programming, 24 F.C.C.R. 11413, at ¶ 126 (2009) [hereinafter *CSVA Report*] ("The number of suppliers of online video and audio is almost limitless.").
[139] Brief of the Cato Institute, *supra* note 135, at *6.
[140] *See Pacifica*. 438 U.S. at 749.
[141] *Fox II*, 613 F.3d at 326; In the Matter of Empowering Parents and Protecting Children in an Evolving Media Landscape, 24 F.C.C.R. 13171, at ¶ 11 (2009); Gamse, *supra* note 134, at 299 ("American children are now exposed to a wide range of media that extend well beyond just broadcast television.").
[142] Brief of the Cato Institute, *supra* note 135, at *12.

upward of 87% of U.S. children ages twelve to seventeen.[143] And when children do watch broadcast content, they do so increasingly using non-broadcast platforms.[144]

Pacifica concluded that broadcasting deserved only limited First Amendment protection because it was a pervasive and uncontrolled medium that intruded into the privacy of one's own home. Thirty-five years later, technological innovation has created a landscape where broadcasting is no longer uniquely pervasive or intrusive. With these characteristics gone, limited First Amendment protection for broadcast speech lacks justification.

2. The protection of children from unsupervised access to broadcast media can no longer justify its regulation.

According to the Stevens plurality in *Pacifica*, a corollary to the uniquely pervasive presence of broadcast media was its easy accessibility to children. Stevens feared that widely available broadcast media, such as Pacifica's broadcast, "could have enlarged a child's vocabulary in an instant."[145] Justice Powell agreed that the FCC was primarily concerned with preventing the broadcast of indecent speech from reaching the unsupervised ears of children.[146] It was a "cruel reality" that "latchkey children" from single-parent families or those with working mothers had widespread, unsupervised access to radio and television during the day.[147] Thus, the pervasiveness of television and radio and their reach into the home precluded an effective choice by the family to control access to unwanted programming.[148]

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[143] *Id*.
[144] *Id*.
[145] *Pacifica,* 438 U.S. at 749.
[146] *Id*. at 757 & n.1.
[147] *Pacifica*, 556 F.2d at 34 & n.6 (Leventhal, J., dissenting).
[148] *Id*. at 33.

Once again technology erases the basis for regulation. Today, viewers can effectively shield themselves and their children from content they deem undesirable using a wide variety of tools.[149] Every television, thirteen inches or larger, sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on a standardized rating system.[150] Moreover, since June 11, 2009, when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip.[151] The rating system uses age-based designations and several specific content descriptors (for coarse language, sex, and violence) allowing parents the ability to tailor the programming they want children to have access to.[152]

Cable and satellite subscribers can filter or block unwanted broadcast programming using set-top boxes that offer locking functions for individual channels and by password protecting access to channels.[153] Parental controls are also usually available, such as DirecTV's "Locks & Limits" feature built into its equipment, which allows parents to block specific movies, lock out entire channels, and set limited viewing hours.[154] In addition, specialized remote controls can limit children to channels

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[149] *See* John P. Elwood, Jeremy C. Marwell & Eric A. White, *FCC, Fox, and That Other F-Word*, 2012 CATO SUP. CT. REV. 281, 300-04 (2012).
[150] 47 U.S.C. § 303(x).
[151] *See* CSVA Report, 24 F.C.C.R. 11413, at ¶ 11.
[152] Brief of the Cato Institute, *supra* note 135, at *14. These ratings are displayed prominently at the beginning of programs, in onscreen menus and interactive guides, and in local newspaper listings. *Id*. at *15.
[153] *Id*. at *17; *see* Gamse, *supra* note 134, at 298-99 ("These pay-TV services typically include additional filtering capabilities for their customers. In fact, cable companies are legally bound to provide blocking devices to their customers upon request, and most do so for free.").
[154] Brief of the Cato Institute, *supra* note 135, at *17.

approved by their parents.[155] Screening tools such as TVGuardian offer a "Foul Language Filter" that can filter out profanity from broadcast signals based on closed captioning.[156]

There are a large number of tools available to parents to allow them to exercise control over what content their children access on the Internet. Many internet service providers such as Comcast, Verizon, and Charter provide an array of parental control features to their subscribers.[157] The rise in use of DVD players, digital video recorders (DVRs), and video on demand (VOD) services provide an additional way for parents to create libraries of approved programming.[158] Using these tools, households can tailor programming to their specific needs and values.

These technologies were unimaginable in 1978, yet are already available to most Americans.[159] The notion that parents are powerless to keep content they deem objectionable away from their children is simply wrong. Parents are now clearly empowered by these accessible new technologies to take an active role in what their children watch. Just as with broadcast media's pervasive presence, technological

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[155] *Id*.
[156] *Id*.
[157] *Id*. at *12-13. Numerous software filtering and other tools are available, often as free downloads, and websites such as www.GetNetWise.org provide information to help parents compare available tools. *Id*. at *13.
[158] *Id*. at *15.
[159] The percentage of households with a DVD player climbed from 13% in 2000 to 83% in 2007. It is estimated that two out of five U.S. households had a DVR last year, up from one in every five households in 2007 and one in every thirteen households in 2005. Nearly 90% of U.S. digital cable subscribers had access to VOD as of March 2007. *Id*. at *16.

innovation erases concerns over parental control and, with that, the judicial justification for denying broadcast speech full First Amendment protection.[160]

With the twin justifications for *Pacifica* eroded, there is no basis for the continued use of intermediate scrutiny for broadcast media. Content-based restrictions by the government should be treated with strict scrutiny as they have been in other forms of media such as cable television and the Internet. With the availability of many self-help alternatives made possible by technological advancement, the Commission should abandon its indecency regulation.

B. The Commission Should Abandon Regulation Because There Is No Evidence of Harm from Indecent Language.

Independent of the technological change and innovation that undermines the foundation of *Pacifica*, there is an additional reason for rejection of the FCC's current indecency policy. The Commission assumes that exposure to indecent language is somehow harmful to children. This assumption lacks support. As the Supreme Court noted in *Fox I*, the FCC has "adduced no quantifiable measure of the harm caused by the language."[161] Similarly, the Second Circuit observed that the FCC's decision to start targeting fleeting expletives was "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation."[162] The FCC not only failed to demonstrate that there was an actual problem, but it also offered no proof of causation of harm from hearing expletives nor even a positive correlation showing that an increase in expletives on the airwaves is

[160] *See* Elwood, *supra* note 149, at 297-300.
[161] *Fox I*, 556 U.S. at 519.
[162] *Fox I*, 489 F.3d at 461.

associated with an increase in use of those expletives by minors.[163] Much scholarly literature exists on profanity and swearing from the fields of communication, sociology, psychology, and pediatric medicine.[164] To justify speech regulation, the Commission needs to demonstrate that the scientific literature shows evidence of harm.

At the most basic level, the Commission does not even identify what the harmful effect on children is that we should be concerned about in the first place.[165] Is it psychological harm? Or is it the imitation of harmful behavior? Or are we concerned about promoting civility and socially appropriate behavior? The failure to even identify the harm may well be related to the complete absence of support for any of these potential harm areas. As to psychological harm, Professor Timothy Jay's research is instructive. Having recorded hundreds of incidences of children saying offensive words in public and private places, Jay is emphatic: "There is no psychological evidence of harm from fleeting expletives."[166]

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[163] *See* Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in Fox Television Stations?*, 47 SAN DIEGO L. REV. 737, 743 (2010).

[164] *Id*. at 746-47. For example, "comprehensive studies of public swearing have emerged" pointing out the frequency of use of offensive words at between 0.3 to 0.7% of verbal output per day (an average of 60-90 offensive words out of the daily production of 15,000-16,000 words). *See* Timothy Jay, *Do Offensive Words Harm People?,* 15 PSYCHOL. PUB. POL'Y & L. 81, 89-90 (2009).

[165] *See* Jessica C. Collins, Note, *The Bogeyman of "Harm to Children": Evaluating the Government Interest Behind Broadcast Indecency Regulation*, 85 N.Y.U. L. REV. 1225, 1244-61 (2010) (evaluating five possible harms to children).

[166] *See* Jay, *supra* note 164, at 92. In his dissent in *Fox I*, Justice Breyer also noted: "One review of the empirical evidence, for example, reports that '[i]t is doubtful that children under the age of 12 understand sexual language and innuendo; therefore it is unlikely that vulgarities have any negative effect.'" 556 U.S. at 564 (Breyer, J., dissenting) (quoting Kaye & Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime–Time Television*, 2004 Mass Communication & Soc'y 429, 433 (Vol.7) (citing two studies)).

Perhaps, instead of psychological harm, the fear is that hearing sexual expletives will lead to harmful sexual behaviors. That discussions about sexuality have harmful effects on children and young adults has been a popular misconception surrounding sex education.[167] While sex education opponents argue that exposing children to explicit discussions of sexuality will result in promiscuous or deviant behavior, sex education research fails to support the harm assumption.[168] Yet, this misconception persists. In contrast, studies demonstrate that abstinence-only programs fail, resulting in either higher rates of sexually transmitted diseases or no change in sexual activities.[169]

What of the suggestion that children mimic behavior they observe, so programs with one-word indecent expletives will produce children who use them?[170] In other words, do children use expletives because they hear them on television? According to Professors Clay Calvert and Matthew Bunker, the impact of television viewing on minors is complex, involving a number of dependent variables.[171] Minors are likely to learn expletives from sources other than television, such as their peers, parents, or

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[167] *See* Jay, *supra* note 164, at 92. Two Presidential commissions on pornography and found little convincing evidence that offensive speech harmed normal adults. The one exception was for deleterious effects on children that were used to create pornographic *images*, but evidence is lacking that children are harmed by speech. *Id*. at 92-93.

[168] *Id*. at 93.

[169] *See id.* (citing the Henry Kaiser Foundation published reports). Other commentators see the same similarity. *See* Jennifer Smith, Comment, *Education Works! How Broadcast Fleeting Expletives Stimulate Comprehensive Sex Education for our Youth*, 49 HOUS. L. REV. 161, 195-96 (2012) (describing the negative effects of abstinence-only sex education policies in Texas).

[170] Justice Scalia espoused this view: "Here it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate. Programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word indecent expletives." *Fox I*, 556 U.S. at 519. Professors Calvert and Bunker have taken Scalia to task for his position on the harm from indecent language. *See* Calvert & Bunker, *supra* note 163, at 742-55.

[171] *See* Calvert & Bunker, *supra* note 163, at 750.

music.[172] And while it is conceivable that children might learn a new expletive from watching television, this does not mean they will start using the word. Social cognitive theory distinguishes between acquisition and performance because people do not perform everything they learn.[173] Whether "observers actually engage in that learned behavior is a function of the reinforcement contingencies (positive or negative) they associate with it."[174]

And what if the speculation is correct and minors do learn expletives from television and then use them? "There is no evidence to show that their usage is, standing alone, harmful."[175] What the research does show is exactly the opposite—swearing has beneficial effects.[176] Jay concludes, "using offensive words in conversations with friends can achieve a number of desirable social effects, which include promoting social cohesion, producing childhood and adult humor as well as catharsis, and using self-deprecation and sarcastic irony to produce harmony."[177]

Instead of evidence of harm, continued regulation is premised on what Professor Jay describes as "folk knowledge of offensiveness."[178] As Professor Jay explains: "Our folk psychology and commonsense beliefs about offensive words do not amount to a scientific understanding of the reasons why people swear or the impact of swearing on other people."[179] Folk psychology is inadequate for courts or commissioners to use in making decisions regarding the harm of offensive language. Jay concludes, "We must

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[172] *Id*. at 754.
[173] *Id*. at 751.
[174] *Id*. at 752.
[175] *Id*. at 753.
[176] *See* Jay, *supra* note 164, at 90-91.
[177] *See id*. at 89-90.
[178] *Id*. at 92.
[179] *Id*. at 91.

discredit folk psychology and supplement it with a more objective, research-oriented view of offensive speech."[180]

C. The Commission's Reliance on Lay Opinion and Citizen Complaints Instead of Science Dooms Its Current Indecency Policy to Failure.

From the very start of its concern over indecency, the FCC embraced a decision-making model where layperson conclusions defined the nature of the problem. This process systematically excludes the rich body of research by linguists, psycholinguists, communication experts, and other social scientists. The FCC uses a citizen complaint process to identify potential violations that is subject to manipulation by special interests. This excessive influence in the regulatory process undermines confidence in the current indecency policy and dooms it to failure.

From the start of FCC enforcement action on indecency, the agency made a conscious choice to use a decision-making process on indecency that elevated its lay opinion over scientific research. While the late comedian George Carlin is most often credited with providing the fodder for the FCC's indecency regulation,[181] that honor should rightfully go to Jerry Garcia. The FCC's first enforcement of § 1464 was against a Philadelphia noncommercial educational radio station, WUHY-FM, for broadcasting an interview with Garcia—who the FCC described as a "leader and member of 'The Grateful Dead,' a California rock and roll musical group."[182] In a fifty-minute taped interview broadcast on January 4, 1970, at 10:00 p.m. as part of the weekly program

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[180] *Id*. (citation omitted).
[181] *See, e.g.*, Sarah Herman, Note, *The Battle for the Remote Control—Has the FCC Indecency Policy Worn Out Its Welcome in America's Living Room?*, 38 WASH. U. J.L. & POL'Y 357, 361-62 (2012) (claiming the FCC first exercised its authority to regulate indecent speech in the *Pacifica* case involving Carlin).
[182] In re WUHY-FM, Eastern Education Radio, Notice of Apparent Liability, 24 F.C.C.2d 408, ¶ 2 (1970).

"Cycle II," Garcia shared his views on ecology, music, philosophy, and interpersonal relations; he also said "shit," "fucking," and "motherfucking."[183] The FCC issued a Notice of Apparent Liability against the radio station. The FCC based the action on its "duty to act to prevent the widespread use on broadcast outlets of such expressions" because "the speech involved has no redeeming social value, and is patently offensive by contemporary community standards."[184] According to the FCC, "it conveys no thought to begin some speech with 'S—t, man . . .' or to use 'f—g' as an adjective throughout the speech."[185] However, the FCC declared language "patently offensive by contemporary community standards" without conducting a single survey, compiling a single word of testimony, or even attempting to define the relevant "community."[186]

Indeed, who did complain in the first place? No one. WUHY-FM received no complaints about the broadcast; neither did the FCC.[187] Because there had been earlier complaints about a different program airing during the 10 to 11 p.m. time slot, the FCC just happened to be monitoring the station on the night of January 4, 1970.[188] Commissioner Cox sized up the problem: "So far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it."[189] Apparently, Chairman Dean Burch was the instigator of the action.[190] He wanted this type of language off the air.

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[183] *Id*. at 409, ¶ 3. For excerpts from the broadcast provided by WUHY-FM, see *id.* at 416.
[184] *Id*. at 410, ¶ 7.
[185] *Id*.
[186] *Id*. at 423 (Johnson, dissenting).
[187] *Id*. at 418.
[188] *Id*.
[189] *Id*.
[190] *See* Campbell, *supra* note 5, at 200 (describing Burch as the instigator).

The same is true in *Pacifica*, where the chimerical community standard is established without a jury verdict, expert testimony, or polls.[191] Recall that in *Pacifica* the FCC relied on a single complaint from John R. Douglas.[192] It is bad enough that the agency acted on such a meager record. It is even worse when there is reason to doubt the truth of the actual complaint. Given Douglas's leadership role in Morality in Media, the six week delay in submitting his complaint, and the misleading description of his fifteen year old son as "young," it is easy to suspect the authenticity of his grievance.[193] It is amazing to think that the entire brouhaha over indecency stems from this single likely false complaint.

This layperson standard continues today. The Commission "remains out of touch with millions of speakers and with meaningful linguistic analyses of swearing in public."[194] Without evidentiary support, the indecency standard is in fact either the individual Commissioner's standards or what the Commissioner supposes national standards should be.[195] Thus, "the divination of the American public's views is left to the discretion of the Commission."[196]

To help in this determination, the FCC uses of a citizen complaint process to identify indecency violations. Reliance on complaints is an inherently unreliable indicator of national standards.[197] Special interest groups, like the PTC, churn the

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[191] *Pacifica*, 556 F.2d at 18 (Bazelon, J., concurring).
[192] *Pacifica*, 438 U.S. at 730.
[193] *See* Powe, *supra* note 8, at 461.
[194] Jay, *supra* note 164, at 92.
[195] *Id*.
[196] Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 ADMIN. L. REV. 813, 847 (2008).
[197] *See Pacifica*, 556 F.2d at 23 n.16 (Bazelon, J., concurring) (doubting reliability of complaints).

complaints, distorting their value as a true indicator of community norms. For example, the PTC is chiefly responsible for the inflation in complaints in 2003 and 2004 that was used to justify ratcheting up indecency enforcement. It is reported that in 2003 the PTC filed 99.86% of all indecency complaints; in 2004 it was 99.9%.[198] Reliance on the complaints filed by the PTC is a perfect example of the way FCC procedure undermines the effectiveness of the policy. As Professor Lili Levi explains, the excessive responsiveness to the complaints of the PTC by the FCC "transforms the agency from an enabler of public discourse to an enforcer of conservative social norms and word taboos."[199]

D. Continued Use of Current Indecency Policy Chills Constitutionally Protected Speech in a Discriminatory Manner.

Continued use of the FCC's current indecency policy guarantees one result: more constitutionally protected speech will be chilled. Broadcasters must choose between airing controversial programming and the fear that the Commission may later find the broadcast objectionable and sanction the station with substantial fines. Faced with this conflict, broadcasters all too often self-censor. This chilling effect of the current speech restrictions is compounded by its disproportionate impact on minorities, youth, and subcultures.

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[198] *See* Clay Calvert, *The First Amendment, the Media, and the Culture Wars: Eight Important Lessons from 2004 about Speech, Censorship, Science and Public Policy*, 41 CAL. W. L. REV. 325, 330 (2005). The FCC received only 111 total indecency complaints in 2000 and a slightly higher 346 complaints in 2001. Then there was a dramatic upsurge in 2002 (13,922), 2003 (202,032) and in 2004 an amazing 1,068,802 complaints. *Id*. at 329. PTC President Tim Winters disputes the accuracy of the statistics on the number of PTC complaints. *See* Clay Calvert & Robert D. Richards, *The Parents Television Council Uncensored: An Inside Look at the Watchdog of the Public Airwaves and the War on Indecency with its President, Tim Winter*, 33 Hastings Comm. & Ent. L.J. 293, 329 (2011).

[199] Levi, *supra* note 196, at 847.

The Commission has been aware of the risk of chilling protected speech since the advent of indecency regulation. In the *WUHY-FM* action, Commissioner Cox foreshadowed that the case would cause other stations "not to carry programming they would otherwise have broadcast, out of fear that someone will be offended, will complain to the Commission, and the latter will find the broadcast improper."[200] This prediction is precisely what has happened. As the Second Circuit put it, "Under the current policy, broadcasters must choose between not airing or censoring controversial programs and risking massive fines or possibly even loss of their licenses, and it is not surprising which option they choose."[201]

There is "ample evidence" that "the FCC's current indecency policy has chilled protected speech."[202] Examples of chilled speech identified by the Second Circuit include: CBS affiliates declining to air the Peabody Award-winning *9/11* documentary; a radio station cancelling a planned reading of Tom Wolfe's novel *I Am Charlotte Simmons*; firing of public radio personality Sandra Loh for a single use of an expletive; Phoenix TV stations dropping live coverage of a memorial service for Pat Tillman; Moosic, Pennsylvania station cancelling all live coverage; Fox deciding not to re-broadcast an episode of *That 70s Show* that dealt with masturbation; and an episode of *House* being re-written after concerns that one of the character's struggles with psychiatric issues related to his sexuality would be considered indecent by the FCC.[203] Other examples of chilled speech are well known, such as: ABC affiliates refusing to rebroadcast *Saving Private Ryan*; PBS self-censoring *The Blues* documentary; and PBS

[200] *WUHY-FM*, 24 F.C.C.2d at 417.
[201] *Fox II*, 613 F.3d at 334.
[202] *Id*.
[203] *Id*. at 334-35.

editing *The War*, a WWII documentary, to remove expletives.[204] There can be no doubt that the FCC indecency policy causes broadcasters to forgo programming out of fear of FCC action.

Not only does the current indecency regime chill protected speech, it likely burdens speech in a discriminatory way. From its infancy, the FCC was aware that its enforcement could have a disproportionate impact on minority viewpoints with which the Commissioners disagreed. Again in *WUHY-FM*, Commissioner Nicholas Johnson saw the restriction as unfairly targeting minority groups: "What the Commission decides, after all, is that the swear words of the lily-white middle class may be broadcast, but that those of the young, the poor, or the blacks may not."[205] Commissioner Cox did as well, viewing the restriction as targeting youth.[206] Justice Brennan voiced the same concern over the discriminatory impact of *Pacifica* on blacks, youth, and protestors.[207]

The record of discriminatory application continues. The disparate treatment of the mainstream Spielberg movie *Saving Private Ryan* and the documentary of largely African-American musicians in *The Blues* illustrates the concern about discriminatory effect the Second Circuit noted in *Fox II*.[208] The FCC's treatment of Sarah Jones's feminist rap, "Your Revolution," also evidences the fear. The Enforcement Bureau

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[204] Courtney L. Quale, *Hear an [Expletive], There an [Expletive], But[t] . . . The Federal Communications Commission Will Not Let You Say an [Expletive],* 45 WILLAMETTE L. REV. 207, 257-58 (2008); *see* Nadine Strossen, *Constitutional Law and Values—Version '08 (Not Necessarily an Upgrade)*, 53 N.Y.L. SCH. L. REV. 735, 740 (2009) (identifying examples of self-censorship).
[205] *WUHY-FM*, 24 F.C.C.2d at 423 (Johnson, dissenting).
[206] *Id*. at 417-18 (Cox, dissenting in part).
[207] *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).
[208] *Fox II*, 613 F.3d at 333; *see supra* notes 100-102 and accompanying text.

slapped Portland, Oregon, public radio station KBOO-FM with a $7,000 notice of apparent liability in 2001 for broadcasting "Your Revolution"—a song created in response to misogyny in male rap lyrics.[209] The Enforcement Bureau deemed the work "patently offensive" and "designed to pander," without identifying exactly what in the song rendered it indecent.[210] While the FCC eventually reversed itself after being sued by the artist, the FCC's delay effectively banned the piece from airing for two years because other stations feared that broadcast would lead to fines.[211] Not only does the FCC's indecency restrictions chill the protected speech of broadcasters, its enforcement has a discriminatory impact that appears to be suppressing viewpoints contrary to the Commission.[212]

III. Alternatively, the Commission Should Return to Its Pre-*Golden Globe II* Policy To Minimize Regulatory Harm.

The best course of action for the Commission is to abandon the use of its current indecency policy in its entirety. However, if the Commission is unwilling to embrace this approach, at a minimum, it should turn the regulatory clock back and restore the indecency policy in place prior to the Commissioners' intervention in *Golden Globe II*. A return to pre-2004 policy would minimize regulatory harm. The agency could return to recognizing the linguistic distinction between sexual and nonsexual uses of "fuck" and similar language. Fleeting expletives would no longer be actionable. Additionally, its newly minted category of profanity as an independent violation would be abandoned.

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[209] *See* In re KBOO Found., 16 F.C.C.R. 10731, ¶ 1 (2001).
[210] *See id.* at 10733, ¶ 8.
[211] *See* In re KBOO Found., 18 F.C.C.R. 2472 (2003); Mira T. Olm, Note, *Sex 24/7: What's the Harm in Broadcast Indecency?*, 26 WOMEN'S RTS. L. REP. 167, 169-70 (2005) (discussing Jones matter).
[212] *See* Olm, *supra* note 211, at 179 (arguing FCC standards are problematic and cause minority voices to be censored arbitrarily and irrationally).

A. The Commission Should Abandon its New *Per Se* Sexual/Excretory Standard.

The FCC currently uses a two-part test for identifying indecency. First, the material must depict sexual or excretory organs or activities.[213] If so, then the FCC determines if the material is patently offensive as measured by community standards for the broadcast medium.[214] The agency has articulated three additional factors that guide in the determination of patent offensiveness: "(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; [and] (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value."[215] Thus, as a threshold matter indecent material must depict sexual or excretory organs or activities.[216]

In *Golden Globe II*, the Commission held for the first time that any use of the word "fuck" is *per se* sexual.[217] To reach this result, the Commission abandoned agency policy and precedent, ignored judicial authority to the contrary, and snubbed the scientific research by linguists distinguishing between uses of the word "fuck." Consequently, the Commission should correct this error and return to its previous standard articulated under *Golden Globe I*.[218]

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[213] *Policy Statement*, supra note 37, at 8002, ¶ 7.
[214] *Id.* at 8002, ¶ 8.
[215] *Id.* at 8003, ¶ 10.
[216] *Id.*
[217] *See Golden Globe II*, *supra* note 50, at 4978, ¶ 8.
[218] *See Golden Globe I, supra* note 46, at 19860-61, ¶ 5.

1. The *per se* rule is contrary to long-standing Commission policy and precedent.

Fundamentally, for something to be deemed indecent, it must relate to sex or excrement. Prior to *Golden Globe II*, the FCC took the reasoned approach that words have both literal and nonliteral meanings. For example, the word "fuck" has at least one literal meaning relating to sexual intercourse and another, nonliteral meaning as an emotive expletive. The broadcast of the word "fuck" was actionable as indecent only if it was used in a literal, sexual way. The Infinity Order preserved this distinction between literal and nonliteral uses of evocative language.[219] The Policy Statement reinforced this.[220]

The Commission's precedent documented this commonsense rule. For example, the broadcast of the repeated use of "fuck" by mobster John Gotti was not indecent because it was not used for its sexual meaning.[221] Similarly, the use of "prick" and "piss" were not indecent because the words were not used to describe sexual or excretory acts or organs.[222] When the Enforcement Bureau considered the outburst by Bono in *Golden Globe I*, it concluded based on long-standing policy and precedent that it was not indecent because "fucking" was used as an adjective or expletive, not to describe sex or excretory matters.[223]

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[219] *See* Pacifica Found., Inc., 2 F.C.C.R. 2698, at ¶ 13 (1987) ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in Pacifica, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.").
[220] *See Golden Globe I, supra* note 46, at 19860-61, ¶ 5.
[221] *See* Mr. Peter Branton, 6 F.C.C.R. 610 (1991) (broadcast of repeated use of fuck by John Gotti not indecent).
[222] Entercom Buffalo License, LLC (WGR(AM)), 17 F.C.C.R. 11997, 11999-12000 ¶¶ 7, 9-10 (2002).
[223] *See Golden Globe I, supra* note 46, at 19860-61, ¶ 5.

Inexplicably, the Commission did an about-face in *Golden Globe II* declaring: "[W]e believe that, given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[224] Later in its Omnibus Order, the FCC extended this new *per se* rule and concluded that any use of the word "shit" was also presumptively indecent because it is "a vulgar, graphic, and explicit description of excretory material" and "[i]ts use invariably invokes a coarse excretory image, even when its meaning is not the literal one."[225] The Commission should now reject this *per se* rule because it is contrary to both law and science.

2. Judicial authority supports abandoning the *per se* rule.

In *Cohen v. California*[226] the Supreme Court established as a matter of law that the word "fuck" has nonsexual meanings. In protest of the Vietnam War, Paul Cohen wore a jacket bearing the phrase "Fuck the Draft" while in the Los Angeles County Courthouse.[227] He was arrested, convicted, and sentenced to thirty days in jail for disrupting the peace.[228] In discussing the inapplicability of the obscenity doctrine, the Supreme Court plainly stated there was nothing erotic about "Cohen's crudely defaced jacket."[229] The Court explicitly recognized "that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[230] The Constitution

[224] *Golden Globe II*, *supra* note 50, at 4978, ¶ 8.
[225] *Omnibus Order*, *supra* note 63, at ¶¶ 138, 143.
[226] 403 U.S. 15 (1971).
[227] *Id.* at 16.
[228] *Id.* at 16-17.
[229] *Id.* at 20.
[230] *Id.* at 26.

protects not just cognitive content, but also "emotive function," "which practically speaking, may often be the more important element of the overall message sought to be communicated."[231] The FCC's contention that "fuck" always has a sexual meaning in all uses is squarely at odds with the Court's ruling in *Cohen.* The Court's conclusion on the dual communicative function of the word fuck precludes the FCC's new *per se* sexual rule.[232]

Not only does the Supreme Court recognize the difference between sexual and nonsexual uses of the word, the federal courts also make the distinction in the context of Title VII sexual harassment claims. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[233] A hostile or abusive work environment can establish a Title VII violation of discrimination based on sex.[234] Hostile work environment claims under Title VII often include allegations of

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[231] *Id.*

[232] *Cohen* provides two additional reasons for rejecting regulation relevant to the indecency debate. The first involves the problem of government line-drawing in determining which words are offensive. Justice Harlan asked, "How is one to distinguish this from any other offensive word?" 403 U.S. at 25. He then answered his own rhetorical question: "Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id*. The FCC's struggle at classification of "fuck" and "shit" illustrates this difficulty. The second involves concern about government's use of public morality "as a convenient guise for banning expression of unpopular views." *Id*. at 26. The same concern exists with the FCC's inconsistent application of its indecency restriction, such as concluding "fuck" in *Saving Private Ryan* is okay, but not in the documentary *The Blues*.

[233] 42 U.S.C. § 2000e-2(a)(1).

[234] *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 64-65 (1986).

verbal harassment using taboo words such as "fuck." The way the federal courts treat this language is instructive.

To establish an actionable Title VII claim, verbal harassment must be of a sexual nature.[235] Therefore, the court must determine if harassing comments are of a sexual nature or not. Applying this sexual/nonsexual test, the Seventh Circuit has found the use of "fuck" in the statements "when the *fuck* are you going to get the product" and "dumb *motherfucker*" are not considered inherently sexual.[236] Similarly, the D.C. Circuit holds that the use of "offensive profanities" that have no sexual connotation such as "you're a *fucking* idiot," "can't you *fucking* read," "*fuck* the goddamn memo," and "I want to know where your *fucking* head was at," as a matter of law cannot make a prima facie case for sexual harassment.[237] Even language that appears to reference explicit sexual content such as "fuck me," "suck my dick," and "kiss my ass" more often than not has no connection whatsoever to the sexual acts referenced.[238] Thus, the law not only recognizes the difference between sexual and nonsexual uses of "fuck" and similar language, but the federal courts model the ease with which such a determination can be made.

3. Linguistic research proves that the *per se* rule is *per se* wrong.

Not only does the law recognize the difference between sexual and nonsexual uses of "fuck," the science of linguistics does as well. "Fuck" is a highly varied word.

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[235] *See* Jamie Lynn Cook, Comment, *Bitch v. Whore: The Current Trend to Define the Requirements of an Actionable Hostile Environment Claim in Verbal Sexual Harassment Cases*, 33 J. MARSHALL L. REV. 465, 479-80 (2000) (identifying a "sexual nature test").
[236] *See* Hardin v. S.C. Johnson & Sons, Inc., 167 F.3d. 340, 345-46 (7th Cir. 1999).
[237] *See* Stewart v. Evans, 275 F.3d 1126, 1131-34 (D.C. Cir. 2002).
[238] *See* Johnson v. Hondo, Inc., 125 F.3d 408, 412 (7th Cir. 1997); Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 261 n.8 (4th Cir. 2001) (accord).

Although its first English usage was likely as a verb meaning to engage in heterosexual intercourse,[239] "fuck" now has various verb uses, not to mention utility as a noun, adjective, adverb, and interjection.[240] Testimony to the varied nature of "fuck" is the definitive source on its use, Jesse Sheidlower's dictionary, THE F-WORD.[241] Now in its second edition, the reference book is devoted exclusively to uses of the word "fuck" and spans 272 pages with hundreds of entries from "absofuckinglutely" to "zipless fuck."[242]

Linguists studying "fuck" identify two distinct words: *Fuck*[1] and *Fuck*[2].[243] *Fuck*[1] is the word used to reference sex. *Fuck*[1] means literally "to copulate."[244] It also encompasses figurative uses such as "to cheat," "to exploit," and "to deceive."[245] *Fuck*[2] however has no intrinsic meaning at all. Rather, it is merely a word of offensive force that can be substituted in oaths for other swearwords or in maledictions.[246] The fact that

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[239] *See, e.g.,* THE F-WORD 117 (Jesse Sheidlower ed., 2d ed. 1999) (noting the initial citation as the poem attacking the Carmelite Friars of Ely and dating it as early as 1450-1475).

[240] *Id.* at 117-33 (identifying fourteen different verb uses); at 105-12 (listing ten separate noun uses); at 116 (defining "fuck" the adjective "describing, depicting, or involving copulation; pornographic; erotic—used before a noun"); at 141 (showing use as interjection); at 168-70 (noting adjective use of "fucking").

[241] *See generally id.* Jesse Sheidlower, who compiled the book, was the Principal Editor of the *OED*'s North American Editorial Unit. *See* Fred R. Shapiro, *The Politically Correct United States Supreme Court and the Motherfucking Texas Court of Criminal Appeals: Using Legal Databases to Trace the Origins of Words and Quotations, in* LANGUAGE AND THE LAW 367, 370 (Marlyn Robinson ed. 2003).

[242] For the curious, *"*absofuckinglutely*"* is an adverb meaning absolutely; "zipless fuck" is a noun meaning an act of intercourse without an emotional connection. *See* THE F-WORD, *supra* note 239, at 1, 272.

[243] *See* Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1719 (2007).

[244] *See* Alan Crozier, *Beyond the Metaphor: Cursing and Swearing in Ulster, in* 10 MALEDICTA 115, 122 (1988-89).

[245] *Id.*

[246] *Id.* at 122-23. *Fuck*[2] as a distinct word also has various uses as part of speech. It can be used as a noun as in "you're lazy as *fuck*," as a verb as in "I'm *fucked* if I know," as an adjective as in "This engine's *fucked*," and as an adverb as in "You know *fucking* well what I mean." *Id.* at 123.

Fuck[2] can be substituted for either "God" or "hell" illustrates the lack of any intrinsic meaning.[247] There are literal, denotative uses of other taboo words. For example, "I stepped in shit" versus the emotive exclamation, "shit!"

This linguistic distinction is crucial. The study of swearing leads to the conclusion that "the primary use of swearing is for emotional connotation, which occurs in the form of epithets or as insults directed at others."[248] Research shows that two-thirds of our swearing is personal and interpersonal expressions of frustration and anger.[249] Consequently, most of the uses of the words "fuck" and "shit" are not denotative references to sex or excrement. The FCC's conclusion to the contrary with its *per se* rule ignores both the lessons from linguistics, as well as commonsense.

B. The Commission Should Reverse its New "First Blow" Standard with Regard to Fleeting Expletives.

Prior to the Commission's dramatic shift in *Golden Globe II*, actionable indecency required repeated use of expletives. The so-called "fleeting expletive" was therefore exempt because, by definition, it involved only the isolated use. In *Golden Globe II*, the Commission reversed its own precedent and articulated a new policy refusing to exempt the "first blow" of indecent language. The Commission should now reverse this policy, as it is contrary to law.

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[247] *Id.* at 124.
[248] Timothy Jay, *The Utility and Ubiquity of Taboo Words*, 4 PERSP. ON PSYCHOL. SCI. 153, 155 (2009). The neuro-psycho-social (NPS) model of swearing is a comprehensive framework that specifies the conditions under which swearing is likely to occur based on a speaker's neurological state, psychological status, and social sensitivity. *Id*. at 158. NPS can predict the probability of using a taboo word denotatively versus connotatively. For example, if one says "asshole," the probability of using it connotatively to refer to a thoughtless person is .92, whereas the probability of using asshole denotatively to refer to the anal sphincter is only .03. Piss is used more equivocally with half of the uses denoting urination and half connoting anger (piss me off). *See id*. at 159.
[249] *See id*. at 155 (citing studies).

The Supreme Court's holding in *Pacifica* controls this area of law. While the slim 5-4 majority authorized the FCC's regulation of indecent broadcasts, the majority also spelled out the narrowness of its holding. The plurality opinion by Justice Stevens made clear that the Court had "not decided that an occasional expletive in either setting would justify any sanction."[250] The remaining Justices in the majority were of like mind. Justice Powell, joined by Justice Blackmun, reiterated the limited nature of the case: "The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."[251] The holding in *Pacifica* is therefore quite narrow. All five Justices in the majority underscore that the authorization of indecency regulation does not apply to the occasional isolated "fleeting expletive."

Thus, the "verbal shock treatment" of Carlin's monologue—the repeated use of expletives—has exemplified what is required under the law to be considered indecent. In the decade following *Pacifica*, the FCC recognized this fact. It continued to reassure broadcasters that the use of fleeting expletives would not be the subject of enforcement actions.[252] Indeed, after *Pacifica* the FCC took no action against a broadcaster for indecency for over a decade.[253]

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[250] *Pacifica*, 438 U.S. at 750.
[251] *Id*. at 760-61.
[252] *See, e.g.*, In re Application of Pacifica Found. For Renewal of License for Noncommercial Station WPFW(FM), 95 F.C.C.2d 750, 760, ¶¶ 16, 18 (1983) (holding three separate occasions using "motherfucker," "fuck," and "shit," did not amount to "verbal shock treatment").
[253] *See* CREECH, *supra* note 30, at 180 (claiming the FCC found no actionable cases for indecent programming between 1975 and 1987); *see also supra* note 30, for examples of the Commission's restraint.

Even as the FCC began more aggressive enforcement with the *Infinity Order*, the Commission reaffirmed that a fleeting expletive would not be actionable.[254] Similarly, in its Policy Statement defining the contours of indecency, the Commission incorporated the requirement into the test for patent offensiveness. According the FCC, "where sexual or excretory references had been made once or had been passing or fleeting in nature, this characteristic weighed against a finding of indecency."[255] It is unsurprising that the FCC's own precedent up through and including *Golden Globe I*, held that an isolated use of "fuck" was considered not actionable.[256]

This changed with *Golden Globe II* where the Commissioners summarily reversed themselves: "While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."[257] The FCC continued to support this policy change in the *Fox* Litigation.[258] The Commission, however, lacks the authority to make this change. *Pacifica* does not authorize indecency regulation over fleeting expletives. Bound by *Pacifica*, the Commission should reverse its position and reaffirm that fleeting expletives are not actionable.

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[254] *See Fox I,* 489 F.3d at 449.
[255] *See Policy Statement, supra* note 37, at 8008, ¶17.
[256] *See Golden Globe I, supra* note 46, at 19861, ¶6.
[257] *Golden Globe II*, *supra* note 50, at 4980, ¶ 12.
[258] *See Fox I*, 556 U.S. at 512 (describing the Commission's view that granting an automatic exemption for isolated or fleeting expletives unfairly forces viewers including children to take "the first blow" and would allow broadcasters "to air expletives at all hours of a day so long as they did so one at a time").

C. The Commission Should Repudiate Its New Profanity Doctrine as Inconsistent with Both Linguistics and Law.

The FCC should also abandon its use of profanity doctrine as an independent basis for speech restriction. While section 1464 applies to "obscene, indecent, or profane language,"[259] the FCC had never used profanity as a basis for speech regulation until *Golden Globe II* where the Commissioners declared that "fuck" was profane. This misapplication is, of course, inconsistent with our understanding of both language and law.

According to linguistics, profanity is a special category of offensive speech that means to be secular or indifferent to religion as in "Holy shit," "God damned," or "Jesus Christ!"[260] The law followed linguistics. As Commissioner Kathleen Abernathy stated, "profane language has historically been interpreted in a legal sense to be blasphemy."[261] Indeed, *Golden Globe II* even recognized that the Commission's own "limited case law on profane speech has focused on what is profane in the sense of blasphemy."[262] Based on this linguistic and legal understanding, the Commission refrained from regulating speech on the basis of profane language.[263]

With *Golden Globe II*, the Commission then altered this sensible course and created its new profanity doctrine on the strength of "common knowledge" that profanity meant "vulgar, irreverent, or coarse language."[264] Then FCC Chairman

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[259] 18 U.S.C. § 1464.
[260] *See* TIMOTHY JAY, WHY WE CURSE: A NEURO-PSYCHO-SOCIAL THEORY OF SPEECH 191 (2000).
[261] Statement of Commissioner Kathleen Q. Abernathy, Re: Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 2004 WL 540339 (F.C.C.), 19 F.C.C.R. 4989, 4989 (Mar. 18, 2004).
[262] *Golden Globe II*, *supra* note 50, ¶ 14.
[263] *See* Statement of Michael K. Powell, *supra* note 58.
[264] *Golden Globe II*, *supra* note 50, at 4981, ¶ 13.

Michael Powell noted that this "decision clearly departs from past precedent."[265] To support this erroneous claim, the FCC offered the Seventh Circuit's "most recent decision defining profane," *Tallman v. United States*.[266] In this 1972 habeas case, the prisoner challenged his sentence on several grounds including the failure of the trial judge to instruct the jury on the definition of profane.[267] The court of appeals dispensed with the contention offering one sentence concerning profanity: "'Profane' is, of course, capable of an overbroad interpretation encompassing protected speech, but it is also construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance."[268] One need not dwell on the many shortcomings of *Tallman*. Suffice it to say, this is a habeas case, not an FCC regulatory matter that pre-dates *Pacifica*. This is an extremely slim reed to support such a dramatic shift in regulatory policy. The Commission reinforced this stale authority with the last definition of profane from *Black's Law Dictionary*.[269] Given this record, the Commission should repudiate its new profanity doctrine and return to its pre-*Golden Globe II* definition.

CONCLUSION

The Commission has the opportunity to correct the mistakes of the past decade of indecency regulation. The best course of action is to abandon regulation of broadcast indecency altogether. In 1978, the media landscape may have justified special treatment

[265] *See* Statement of Michael K. Powell, *supra* note 58.
[266] 465 F.2d 282 (7th Cir. 1972).
[267] *Id*. at 284-85.
[268] *Id*. at 286.
[269] *See Golden Globe II*, *supra* note 50, at 4981, ¶ 13 n.34 (citing *Black*'s last definition of profane).

of broadcast television and radio. No possible justification exists today. Once media prima donnas, broadcast networks are now merely members of the chorus. The same technological innovation that has transformed media access also empowers parents with the V-chip and similar tools to control access to unwanted programming. It simply makes no sense to continue regulation given the complete absence of evidence of any harm from broadcast indecency. The Commission's current reliance on layperson opinion and churned citizen complaints dooms its present policy to failure. The result is the chilling of constitutionally protected speech. If the Commission cannot make a complete break from its regulatory regime, at a minimum, it should return to the more sensible policy of restraint it followed prior to *Golden Globe II*.

Respectfully submitted,

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